

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION**

RONDA HORSLEY,  Plaintiff,  v.  HEART HOSPITAL OF SOUTH DAKOTA, LLC, a North Carolina Limited Liability Company, d/b/a, AVERA HEART HOSPITAL OF SOUTH DAKOTA and PAUL E. MEYER, MD,  Defendant.	Civ. 19- <u>4092</u>  <b>COMPLAINT AND DEMAND FOR JURY TRIAL</b>
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Plaintiff, Ronda Horsley, for her causes of action against Defendants, Heart Hospital of South Dakota, LLC, a North Carolina Limited Liability Company, doing business as Avera Heart Hospital of South Dakota, and Paul E. Meyer, MD, states and alleges on information and belief as follows:

**PARTIES, JURISDICTION & VENUE**

1. The matter arises out of a medical procedure performed on Plaintiff by Defendant, Paul Meyer, MD (hereinafter “Meyer”), at a facility operated by Heart Hospital of South Dakota, LLC, a North Carolina Limited Liability Company, doing business in the State of South Dakota under the business name “Avera Heart Hospital of South Dakota” (hereinafter “Avera Heart Hospital”), in Sioux Falls, Minnehaha County, South Dakota on or about February 28, 2018.

2. Plaintiff is a resident of the State of Iowa.

3. Avera Heart Hospital is a North Carolina limited liability company and was organized for the purpose of providing health care and at all times material hereto was in fact

providing health care and hospital services including thoracic surgery services in Minnehaha County, South Dakota, and at all times material, had as its employee and agent, nurses, physicians and other health care staff including Defendant, Meyer, who were all responsible for the care and treatment of Plaintiff, and who were acting within the scope of their employment, thus subjecting Defendant to vicarious liability for the acts and omissions of all its agents and employees in addition to its own liability.

4. On information and belief, Meyer is a resident of the State of South Dakota.

5. At all relevant times, Meyer was licensed to practice medicine in South Dakota, and he held himself out to the public to be competent, careful and experienced in the specialty of thoracic surgery and was at all times material the agent of Defendant Avera Heart Hospital and acting within the scope of his agency.

6. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §1332 because there exists complete diversity of citizenship between Plaintiff and Defendants and the amount in controversy claimed by Plaintiff, exclusive of interest and costs, exceeds Seventy-five Thousand Dollars (\$75,000).

7. Venue is proper in accordance with 28 U.S.C. §1391 because the acts of Defendants complained of occurred in Minnehaha County, South Dakota against Plaintiff as more fully set forth herein.

#### **FACTUAL BACKGROUND**

8. At all relevant times, Defendant had a duty to comply with accepted standards of practice in providing medical care and treatment to Plaintiff.

9. On January 26, 2018, Plaintiff was determined to have a nodular change in the upper lobe of her right lung by Yankton pulmonologist, Michael Pietila, MD.

10. Dr. Pietila charted, “I will refer her to the thoracic surgeon for consideration of wedge excision *via thoracoscopy* and if indeed malignancy is confirmed then right upper lobectomy.”

11. Dr. Pietila specifically charted, “I think it would be *very difficult to biopsy transthoracically*”.

12. On February 14, 2018, Plaintiff met with Meyer at Avera Heart Hospital where Meyer explained that he would proceed in the manner described by Dr. Pietila – using a minimally invasive scope to biopsy the nodule and then if the nodule was determined to be malignant, remove the upper right lobe of the lung. Meyer charted that plan as:

PLAN: We will schedule for right *thoracoscopy* with wedge resection and *possible conversion to open* for completion lobectomy.

13. Thoracoscopy is a minimally invasive surgery unlike a thoracotomy which is performed transthoracically and requires an invasive incision through the chest wall and spreading the patient’s ribs.

14. On February 27, 2018, the day before surgery, Meyer and Avera Heart Hospital secured the written consent for surgery from Plaintiff for, “*Right thoracoscopy* with wedge resection, excisional biopsy of lung nodule.”

15. On February 28, 2018, the morning of surgery, Avera Heart Hospital anesthesia described the procedure to Plaintiff as a thoracoscopy and the Pre-Anesthesia Evaluation stated, “Surgical Procedure: R *Thoracoscopy*.”

16. Meyer, just prior to surgery, told Plaintiff that he was certain that her lung nodule was cancerous even though Meyer could not possibly know the status of the lung nodule without pathological evaluation. Meyer failed to disclose to Plaintiff that he could not definitively know

that the lung nodule was cancerous absent pathological evaluation, and, based on Meyer's failure to disclose this material information, convinced Plaintiff at the very last minute to abandon the established minimally invasive surgical plan for a transthoracic approach.

17. At the time of surgery, Meyer did not perform the minimally invasive thoracoscopy that was recommended by Dr. Pietila, specified in Meyer's dictated surgical plan and contained in the written surgical consent form signed by Plaintiff, but instead performed the invasive thoracotomy without any necessary pathology analysis to determine whether Plaintiff even had cancer.

18. After performing a wedge resection to biopsy the nodule, Meyer did send tissue to pathology for a determination of whether any cancer was present.

19. However, without waiting to learn the results of the pathology, Meyer, consistent with his reckless belief that he could diagnose cancer without any tissue, proceeded to "mobilize" Plaintiff's upper right lobe for removal by performing unnecessary and unconsented to dissection and ligation of structures and unnecessarily exposing the surface of anatomical structures thus exposing Plaintiff to surgical trauma, adhesions and risk.

20. While Meyer was working to remove Plaintiff's upper right lobe, pathology determined that the nodule was not cancerous and that Meyer was, in fact, mobilizing a healthy lobe for removal.

21. Following the procedure, Plaintiff developed a persistent air leak from the lung that caused severe and painful subcutaneous air in Plaintiff's arms, legs, chest and face.

22. Prior to the air leak, Plaintiff's face looked like this:



23. Plaintiff's condition was ignored until Plaintiff was experiencing excruciating pain and her face looked like this:



24. On March 4, 2018, a different surgeon, Steven Feldhaus, MD, finally returned Plaintiff to surgery and placed a chest tube for decompression of pneumothorax and severe subcutaneous emphysema and first disclosed to Plaintiff what Meyer had done.

#### **CAUSES OF ACTION**

25. Defendants conduct herein described was a radical departure from the applicable standard of care and constituted negligence and failure to obtain informed consent.

26. Meyer knew that he could not definitively state that Plaintiff's lung nodule was cancerous absent pathological evaluation. Plaintiff relied on Meyer's intentional or reckless nondisclosure to her detriment.

27. Plaintiff would not have signed the last minute surgical consent form absent Meyer's failure to disclose material information.

28. As a result of Meyer's intentional, reckless, or negligent deceit, Plaintiff suffered damages.

29. Meyer's conduct in performing an unnecessary thoracotomy and unnecessary and unconsented to mobilization without the informed consent of Plaintiff, constituted a battery against Plaintiff as unconsented to and offensive touching of her body.

30. Defendant's conduct was a direct and substantial cause of Plaintiff's injuries and complications, past and future.

31. As a direct and proximate cause of Defendant's conduct, Plaintiff has suffered and/or will suffer damages in excess of Seventy-five Thousand Dollars (\$75,000), as follows:

- A. Physical injuries and physical pain, past and future;
- B. Past and future medical and associated expenses;
- C. Permanent scarring, impairment and disability;
- D. Great mental pain and inconvenience, past and future; and
- E. Loss of the normal pleasures of life to which she was formally accustomed.

WHEREFORE, Plaintiff requests a judgment against the Defendant in an amount in excess of Seventy-five Thousand Dollars (\$75,000), as follows:

- 1. For general damages in an amount which the jury determines is just and proper;
- 2. For Plaintiff's special damages in an amount which the jury determines is just and proper;
- 3. For punitive damages;
- 4. For Plaintiff's costs and disbursements herein;
- 5. For prejudgment and post-judgment interest as provided by law; and,
- 6. For any other and future relief which the Court determines is just and proper.

### **JURY DEMAND**

Plaintiff hereby requests a trial by jury on all claims and issues so triable.

Dated this 22<sup>nd</sup> day of May, 2019.

BRENDTRO LAW FIRM, P.C.

/s/ Robert D. Trzynka

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## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

RONDA HORSLEY

(b) County of Residence of First Listed Plaintiff Woodbury  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Robert D. Trzynka and Daniel K. Brendtro, Brendtro Law Firm, P.O. Box 2583, Sioux Falls, SD 57101, (605) 951-9011

## DEFENDANTS

HEART HOSPITAL OF SOUTH DAKOTA, LLC, a North Carolina Limited Liability Company, d/b/a, AVERA HEART HOSPITAL OF SOUTH DAKOTA and PAUL E. MEYER, MD.

County of Residence of First Listed Defendant Wake  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                                       |                            |   |                            |                                       |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
|   | PTF                                   | DEF                        |   | PTF                        | DEF                                   |
| Citizen of This State                   | <input type="checkbox"/> 1            | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State                | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5            |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT		TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 375 False Claims Act	
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))	
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability			<input type="checkbox"/> 400 State Reapportionment	
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability				<input type="checkbox"/> 410 Antitrust	
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine				<input type="checkbox"/> 430 Banks and Banking	
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability				<input type="checkbox"/> 450 Commerce	
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)	<input type="checkbox"/> 350 Motor Vehicle				<input type="checkbox"/> 460 Deportation	
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability				<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury				<input type="checkbox"/> 480 Consumer Credit	
<input type="checkbox"/> 190 Other Contract	<input checked="" type="checkbox"/> 362 Personal Injury - Medical Malpractice				<input type="checkbox"/> 485 Telephone Consumer Protection Act	
<input type="checkbox"/> 195 Contract Product Liability					<input type="checkbox"/> 490 Cable/Sat TV	
<input type="checkbox"/> 196 Franchise					<input type="checkbox"/> 495 Securities/Commodities/Exchange	
					<input type="checkbox"/> 890 Other Statutory Actions	
					<input type="checkbox"/> 891 Agricultural Acts	
					<input type="checkbox"/> 893 Environmental Matters	
					<input type="checkbox"/> 895 Freedom of Information Act	
					<input type="checkbox"/> 896 Arbitration	
					<input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision	
					<input type="checkbox"/> 950 Constitutionality of State Statutes	

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. §1332

Brief description of cause:  
Medical malpractice and fraud

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See Instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE